Petition

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No. 81-886

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1981

SAILORS' UNION OF THE PACIFIC, AFL-CIO,
Petitioner,

vs.

RICHARD S. SCHWEIKER, SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES OF THE UNITED STATES, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Did the Supplemental Appropriations and Rescissions Act, 1981 (P.L. 97-12) repeal by implication the provisions of 42 U.S.C. § 248a?

2. Would continued funding of medical care and treatment to merchant seamen, pursuant to the provisions of 42 U.S.C. § 248a, violate the provisions of the Anti-Deficiency Act, 31 U.S.C. § 665?

3. Is the executive branch of government empowered to effectively repeal mandatory health and welfare legislation by defunding same through the budget rescission process of 31 U.S.C. § 1402?

4. Are merchant seamen's statutory rights to free health care protectable interests within the purview of the Fifth Amendment?

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RICHARD S. SCHWEIKER, SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES OF THE UNITED STATES, et al.,
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PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

Petitioner Sailors' Union of the Pacific, AFL-CIO, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 24, 1981.

OPINIONS BELOW

The Court of Appeals' denial of Petition for Rehearing and Request for Rehearing En Banc was entered on August 5, 1981. The opinion of the Court of Appeals entered on June 24, 1981, is attached hereto (Appendix A), together with the dissenting opinion filed June 25, 1981 (Appendix B). The Court of Appeals' decision reversed the prior decisions and opinions of the District Court for the Northern District of California of June 4, 1981 (Appendix C), entering a preliminary injunction against respondents herein, and the District Court's subsequent reaffirmation, after remand for further consideration by the Court of Appeals (Appendix D), of that preliminary injunction in its opinion of June 18, 1981 (Appendix E).

JURISDICTION

The Court of Appeals' opinion was entered on June 24, 1981. An Application for Stay and Continuance of Injunction was filed with this Court on July 2, 1981, and denied by the Honorable William H. Rehnquist, on July 8, 1981. The timely Petition for Rehearing and Request for Rehearing En Banc was denied by the Court of Appeals on August 5, 1981.

This Court's jurisdiction is invoked under Title 28, United States Code, Section 1254(1).

STATUTORY PROVISIONS INVOLVED

The following statutory provisions are primarily involved with the disposition of this matter:

United States Code, Title 42:

Section 248a. Closing or transfer of control of hospitals; reduction of services; Congressional authorization required.

(a) Except as provided in subsection (b) of this section, the Secretary of Health and Human Services shall take such action as may be necessary to assure that the hospitals of the Public Health Service, located in Seattle, Washington, Boston, Massachusetts, San Francisco, California, Galveston, Texas, New Orleans, Louisiana, Baltimore, Maryland, Staten Island, New York, and Norfolk, Virginia, shall continue—

(1) In operation as hospitals of the Public Health Service,

(2) to provide for all categories of individuals entitled or authorized to receive care and treatment at hospitals or other stations of the Public Health Service inpatient, outpatient, and other health care services *in like manner as such services were provided on January 1, 1973*, to such categories of individuals at the hospitals of the Public Health Service referred to in the matter

preceding paragraph (1) and at a level and range at least as great as the level and range of such services which were provided (or authorized to be provided) by such hospitals on such date, and

(3) to conduct at such hospitals a level and range of other health-related activities (including training and research activities) which is *not less than the level and range of such activities which were being conducted on January 1, 1973*, at such hospitals.

(b)(1) *The Secretary may—*

(A) *close or transfer* control of a hospital of the Public Health Service to which subsection (a) of this section applies.

(B) *reduce the level and range of health care services* provided at such a hospital from the level and range required by subsection (a)(2) of this section or change the manner in which such services are provided at such a hospital from the manner required by such subsection, or

(C) *reduce the level and range of the other* health-related activities conducted at such hospital from the level and range required by subsection (a)(3) of this section,

If Congress by law (enacted after November 16, 1973) *specifically* authorizes such action. (emphasis supplied)

United States Code, Title 31:

Section 665a. Expenditures or contract obligations in excess of funds prohibited:

(a) No officer or employee of the United States shall make or authorize an expenditure from or create or authorize an obligation under any appropriation or fund in excess of the amount available therein; nor

shall any such officer or employee involve the Government in any contract or other obligation, for the payment of money for any purpose, in advance of appropriations made for such purpose, *unless such contract or obligation is authorized by law.* (emphasis supplied)

• • • •

Apportionment necessitating deficiency or supplemental estimates

(e)(1) No apportionment or reapportionment, or request therefor by the head of an agency, which, in the judgment of the officer making or the agency head requesting such apportionment or reapportionment, would indicate a necessity for a deficiency or supplemental estimate shall be made except upon a determination by such officer or agency head, as the case may be, that *such action is required because of* (A) any laws enacted subsequent to the transmission to the Congress of the estimates for an appropriation which require expenditures beyond administrative control; or (B) *emergencies involving the safety of human life,* the protection of property, *or the immediate welfare of individuals* in cases where an appropriation has been made to enable the United States to make payment of, or contributions toward, sums which are required to be paid to individuals either in specific amounts fixed by law or in accordance with formulae prescribed by law.

(2) In each case of an apportionment or a reapportionment which, in the judgment of the officer making such apportionment or reapportionment, would indicate a necessity for a deficiency or supplemental estimate, such officer *shall immediately submit a detailed report of the facts of the case to the Congress.* In transmitting any deficiency or supplemental estimates required on account of any such apportionment or reapportionment, reference shall be made to such report. (emphasis supplied)

Section 1402. Rescission of Budget Authority.

* * * *

Requirement to make available for obligation

(b) Any amount of budget authority proposed to be rescinded or that is to be reserved as set forth in such special message *shall be made available for obligation unless, within the prescribed 45-day period, the Congress has completed action on a rescission bill* rescinding all or part of the amount proposed to be rescinded or that is to be reserved. (emphasis supplied)

* * * *

STATEMENT OF THE CASE

A. Procedural Statement

Petitioner is the plaintiff in a civil action pending before the United States District Court for the Northern District of California, the Honorable Robert P. Aguilar, presiding. This civil action was brought on behalf of the five hundred thousand merchant seamen beneficiaries of the United States Public Health Services (USPHS) hospital and outpatient clinic system entitled to free medical care and treatment pursuant to a statutory scheme enacted in 1798 (July 16, 1798, 1 Stat. 605) and presently codified in 42 U.S.C. § 249. The action sought declaratory and injunctive relief from a course of action conceived and perpetrated by respondents Schweiker, et al., commencing on or about February 27, 1981 with the adoption of a "closure policy" calling for the abolishment of all USPHS health care services and closing of facilities effective October 1, 1981, with a cessation of patient admissions July 1, 1981, all of which actions were in violation of 42 U.S.C. § 248a and the case precedent of *Seafarers' International Union of North America v. Weinberger*, 363 F.Supp. 1053 (D.C. D.C. 1973).

The holding in *Seafarers'* concluded as a matter of law that, *inter alia*, petitioner's class of merchant seamen were statutorily entitled to health care and treatment under the

statutory scheme embraced by the Public Health Service Act, 29 U.S.C. §§ 201, *et seq.*, that respondent Secretary of Health and Human Services possessed no discretion with respect to the proffering of such medical entitlements; and, that under the terms of P.L. 92-585, readopted and subsequently codified as 42 U.S.C. § 248a, respondent Secretary was obligated to maintain and to continue to provide to petitioner's class of merchant seamen, and to all other statutorily entitled beneficiaries, the same "level and range of services" as were "provided on January 1, 1973 and, further, respondent Secretary could "close or . . . reduce the level and range of health services" so provided only "if Congress by law specifically authorized such action." *Ibid* at pp. 1057-1058; 42 U.S.C. § 248a.

Based on the holding in *Seafarers'* and the absence of Congressional action "specifically" authorizing respondents closure and benefit reduction activities, the District Court on May 26, 1981, entered a temporary restraining order enjoining respondents from taking any actions inconsistent with the requirements of Section 248a, which action was reaffirmed with the entry of its preliminary injunction of June 4, 1981, specifically proscribing the Secretary and other named defendants "from taking any actions that will inhibit medical care at any PHS hospital or facility or reduce care at such locations below that level provided on January 1, 1973, until Congress has repealed, 42 U.S.C. § 248a." A-15, *Appendix.*

A Notice of Appeal and an Emergency Motion for Expedited Appeal and Stay were filed forthwith by respondents on June 5, 1981, with the result that on June 9, 1981, the Ninth Circuit Court of Appeals granted respondents' motion for expedited review, while denying their request for stay of the District Court's preliminary injunction of June 4, 1981.

On June 17, 1981, the Ninth Circuit suspended its prior Order of June 9, 1981, and remanded the action to the District Court to reconsider its decision in light of the passage

of P.L. 97-12 (Supplemental Appropriations and Rescission Act 1981) on June 4, 1981, since it was "unclear whether the District Court had in mind the substance of the new law when it issued the injunctive order." A-21, *Appendix*. This latter statute purportedly reduced USPHS funding for FY 1981 by some $49,766,000 and set an obligation ceiling of $128,399,000 for operation of its hospitals, clinics and contract care programs for the balance of the fiscal year through September 30, 1981. Respondents argued that the defunding of the USPHS system effectively "repealed by implication" the provisions of Section 248a, citing *United States v. Dickerson*, 310 U.S. 554, 555-556, 84 L.Ed. 1356 (1940).

Accordingly, on June 18, 1981, the District Court addressed itself to the effects of P.L. 97-12 within the context of respondents' argument that it "repealed by implication" the provisions of Section 248a requiring maintenance of USPHS health care services. Upon review of the enactment and the attendant legislative history, the District Court found, *inter alia*, that P.L. 97-12 "does not repeal Section 248a; nor does it comply with the specificity requirement set forth by Congress in 248a" thereby reaffirming the prior issuance of its preliminary injunction since Congressional passage of P.L. 97-12 did not "specifically" authorize a closure or reduction of USPHS facilities or benefits. The District Court's ruling on remand was entered at the close of the hearing on June 18, 1981. A-26, *Appendix* E.

Petitioner's brief was filed with the Ninth Circuit on June 22, 1981, arguing in support of the District Court's grant of preliminary injunctive relief and asserting that this Court's decision in *United States v. Will*, ... U.S. ....; 66 L.Ed.2d 392, 410 (1980), disfavoring repeals by implication in the absence of specific evidence of Congressional intent, precluded repeal of Section 248a by implication; and, further, that Congressional failure to adopt the rescission aspects of P.L. 97-12 pertaining to the USPHS

within 45 days after the submission of said budget rescission request to Congress invalidated said rescission by operation of 28 U.S.C. § 1402 of the Budget Reform Act of 1974.

Thereafter, on June 24, 1981, the Ninth Circuit filed the majority decision of Circuit Judges Choy and Alarcon which held that: (1) Congress has spoken with sufficient clarity in enacting P.L. 97-12 to suspend the operation of or rescind 42 U.S.C. § 248a; citing *United States v. Will, supra;* (2) that the District Court "abused its discretion in finding that the balance of hardships tips in favor of petitioner; and (3) that "a greater public interest is served in keeping the hospitals and clinics open longer to serve all of the beneficiaries than in keeping them open for a shorter time to provide American seamen with full services." A-2, *Appendix.*

The dissenting opinion of Justice Norris was filed the following day, June 25, 1981, and while disagreeing with the existence of any evidentiary support for his brethren's views on the abuse of the District Court's discretion and balance of hardships, the opinion found that "neither the language of P.L. 97-12 nor its legislative history reflects a clear Congressional intent to reduce health services below the minimum levels mandated by 42 U.S.C. § 248a." A-4, *Appendix.*

On July 1, 1981, petitioner filed for rehearing and stay of order before the Ninth Circuit, which request was denied by the Circuit on August 5, 1981.

B. Factual Statement

The preliminary injunction entered by the District Court attempted to maintain and preserve the legal entitlements of merchant seamen to free medical care and treatment at United States Public Health Services (USPHS) facilities as accorded them pursuant to the provisions of the Public Health Services Act of 1944, 42 U.S.C. § 249(a). Placed at issue by the granting of the injunction, however, were the

provisions of Public Law 93-155 (1973), 42 U.S.C. § 248a, respecting the statutory preconditions to closure of USPHS facilities, and/or reduction of health care services, by the Secretary of Health and Human Services. See: Section 248a, *supra*. As prescribed by the aforementioned statute, "if Congress by law (enacted after November 16, 1973) specifically authorizes such action . . . the Secretary may (A) close or transfer control of a hospital of the Public Health Service . . . (B) reduce the level and range of health care services . . ." 42 U.S.C. § 248a (b)(1). Absent such Congressional enactment "the Secretary shall take such action as may be necessary to assure that the hospitals of the Public Health Service . . . shall continue . . . inpatient, outpatient and other health care services in like manner as such services were provided on January 1, 1973" 42 U.S.C. § 248a (a)(2).

Notwithstanding this statutory mandate, respondent Secretary Schweiker, in concert with the other named respondents and others, embarked upon a scheme to dismantle the USPHS health care system and deny merchant seamen the health care and treatment benefits provided thereunder. On or about February 26, 1981, the current administration submitted a budget proposal to Congress for defunding the USPHS system by rescinding fiscal 1981 expenditures by $31 million and $110 million for fiscal 1982.

Thereafter, on or about April 23, 1981, respondents Schweiker and Bachman formulated and adopted a "closure policy" calling for the abolishment of USPHS health care services and closing of facilities "effective October 1, 1981," with a cessation of patient admissions prior thereto. *HSA Closure Policy,* Exhibit B (NR 4). Consistent with said policy, on or about May 27, 1981, as per direction of the Secretary, respondent McCasland, Medical Director, USPHS Hospital, San Francisco, announced the termination of all patient admissions effective July 1, 1981. Par 4, *Johnson Declaration* (NR 9).

The announced termination of USPHS admissions was followed closely by respondent Secretary Schweiker's "Publication of a Final Rule" on May 8, 1981 curtailing contract patient care for American seamen effective said date. *Bureau of Medical Services Circular,* Exhibit C (NR 4).[1]

The direct consequence of the respondents' precipitous actions in this matter was to: (1) circumvent, nullify and frustrate the provisions of Public Law 93-155 (1973), 42 U.S.C. § 248a; (2) deny and reduce health care and treatment benefits to merchant seamen guaranteed them by 42 U.S.C. § 249(a); and (3) jeopardize the retention of a competent medical and clerical staff at the USPHS Hospital, San Francisco, thereby giving rise to the filing of the within action to vindicate merchant seamen's statutory rights as circumscribed in the aforementioned statutes.

C. History of the USPHS

The history of the USPHS hospital system dates back to 1798 when Congress first established a marine hospital to provide medical care and treatment for sick and disabled seamen. Act of July 16, 1798, 1 Stat. 605. In the ensuing half-century, marine hospitals flourished on American sea coasts and inland waterways providing the special medical care and attention required by seamen due to the nature and character of their calling. By the beginning of this century, there were twenty-three (23) marine hospitals in existence operating on a national basis under the supervision of the Surgeon General. These hospitals, originally financed in part by taxes levied on seamen, also provided medical facilities for other classes of beneficiaries, in addition to seamen, including among others, Coast Guard personnel, National Oceanic and Atmospheric Administration

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[1]Contract patient care describes that statutorily authorized treatment of seamen at non-USPHS facilities and clinics under contract to the USPHS in localities where there is no available USPHS facility or where the local USPHS facility is incapable of providing the particular care necessary, 42 C.P.R. § 32.11.

employees, and federal employees injured on the job. Additionally, the hospital performed other functions such as medical examinations of immigrants, maritime and medical research, and treatment of lepers.

In 1916, the hospital system was re-named the U.S. Public Health Service Hospital System and its operations were greatly expanded. In 1944, in enacting the Public Health Service Act, 29 U.S.C. § 201 *et seq.*, Congress revamped the entire structure of the USPHS and provided the statutory basis for the continued maintenance of the USPHS Hospital System. At the close of World War II, there were twenty-nine (29) USPHS hospitals located throughout the nation providing free medical care and treatment for thousands of primary beneficiaries (those entitled to care and treatment at such facilities), and thousands more of secondary beneficiaries (those eligible to utilize USPHS facilities).

In the period 1965 through 1973, the number of USPHS hospitals had been reduced to eight (8), while paralleling an extended public and Congressional debate regarding the future operation and closure of USPHS facilities and termination of health care services. This debate culminated in the enactment of two successive provisions outlining the procedures and conditions for closure. The first of these enactments was contained in Public Law 92-585 (27 Oct 72), which was scrutinized in the matter of *Seafarers International Union of North America, AFL-CIO v. Weinberger,* 363 F.Supp. 1053 (D.C. D.C. 1973), and subsequently repealed and replaced by the present provisions of 42 U.S.C. § 248a now before this Court. In both instances, however, the legislation prescribed in specific terms the pre-conditions for closure and reduction of services offered by the USPHS.

REASONS FOR GRANTING THE WRIT

The Court of Appeals' decision interpreting P.L. 97-12 to defund and repeal the statutory entitlements of 42 U.S.C. § 248a abrogates this Court's prior holdings on "re-

peal by implication" as summarized in *United States v. Will*, ... U.S. ....., 66 L.Ed.2d 392 (1980), and the protectable interests of petitioner's class of merchant seamen to free health care under the due process clause of the Fifth Amendment. For this reason, the grant of a writ of certiorari should issue herein based upon the following arguments:

I

P.L. 97-12 DID NOT REPEAL BY IMPLICATION OR OTHERWISE, THE PROVISIONS OF SECTION 248a.

Respondents' argument in defense of its noncompliance with section 248a is that said section was repealed by the recent enactment of P.L. 97-12, citing for their authority the holding in *United States v. Dickerson*, 310 U.S. 554, 555-56 (1940) that Congress may suspend, modify or repeal previously enacted substantive law through the defunding effects of a subsequent appropriations bill.

Notwithstanding, repeals by implication are universally disfavored by the courts unless the Congressional intent to accomplish such a purpose is clearly manifest. This is particularly true where, as herein, the repealing measure asserted is an appropriations bill. In *United States v. Will*, ... U.S. ....., 66 L.Ed.2d 392, 410 (1980), the Court stated:

> As a general rule, 'repeals by implication are not favored.' *Posadas v. National City Bank*, 296 U.S. 497, 503, 80 L.Ed. 351, 56 S.Ct. 349 (1936). See also *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 189, 57 L.Ed.2d 117, 98 S.Ct. 2279 (1978), and *Morton v. Mancari*, 417 U.S. 535, 549, 41 L.Ed.2d 290, 94 S.Ct. 2472 (1974). This rule applies with a special force when the provision advanced as the repealing measure was enacted in an appropriations bill. *Tennessee Valley Authority v. Hill, supra*, at 190, 57 L.Ed.2d 117, 98 S.Ct. 2279. Indeed, the rules of both Houses limit the ability to change substantive law through appropriations measures. See Sen Standing Rule XVI (4); H R Rule XXI (2). Nevertheless, when Congress desires to

> suspend or repeal a statute in force, "(t)here can be no doubt that . . . it could accomplish its purpose by an amendment to an appropriations bill, or otherwise." *United States v. Dickerson*, 310 U.S. 554, 555, 84 L.Ed. 1356, 60 S.Ct. 1034 (1940). "The whole question depends on the intention of Congress as expressed in the statutes." *United States v. Mitchell*, 109 U.S. 146, 150, 27 L.Ed. 887, 3 S.Ct. 151 (1883).

In the instant case, the clear and explicit intent of Congress in the passage of § 248a was to guarantee a specific level of medical care for the identified beneficiaries. The House of Representatives in the Report on the Supplemental Appropriations and Rescission Bill of 1981, Report No. 97-29 expressly recognized that the Appropriations Bill could not lawfully disentitle merchant seamen to the health care mandated by statute:

> The Committee has approved the requested rescission of thirty-six million, one hundred and fifty-five thousand related to the President's proposal to close the Public Health Service Hospitals and Clinics. The Committee has also approved a supplemental of ten million for the Assistant Secretary for Health to pay for termination costs and transitional expenses related to the hospitals' closure. *Approval of this request does not affect the entitlement of the merchant seamen to federally subsidized health care which the President has proposed be eliminated. This issue is outside the jurisdiction of the Appropriations Committee and sufficient funds have been retained to fund care for the merchant seamen through the contract care mechanism in 1981. Until the law is changed, funds for contract care will continue to be a mandatory cost.* The Committee has heard testimony from the Administration indicating that several of the communities in which these hospitals are located are considering the possibility of taking over operation of a

> particular facility. Should any of these communities make a firm commitment to take over one of the hospitals, the Committee will seriously consider a request to add funds to the 1982 bill to upgrade the facility for community use. 97th Congress, 1st Session, House of Representatives Report No. 97-29m May 1981; Bachman Declaration, Exhibit H (NR 17). (emphasis added.)

Thus, the House clearly recognized that the actions of Congress through the Supplemental Appropriations Bill and the position of the Administration through the recommendations of the Secretary could not jeopardize the entitlement of merchant seamen to medical care as provided under section 248a.

In the Conference Report relating to P.L. 97-12 (House Report No. 97-124; Exhibit A to Defendant's Mem. to Dissolve Prelim. Inj. — 6/18/81), as noted by the District Court, Congress specifically refutes any characterization of the measure as repealing section 248a by specifically exhorting the Secretary "to maintain as many services as possible" and forbidding the closure of any hospital prior to October 1, 1981. *Ibid* at pp. 68-69.

The involvement of the District Court in the instant case is that of enforcing the law as it is currently written entitling certain beneficiaries to medical care. Our system of government is a tripartite one, with each branch having certain defined functions delegated to it by the Constitution. It is the exclusive province of the Congress to formulate legislative policies and mandate programs and projects. Once Congress has exercised its delegated powers, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought. Within this system, the power of an agency to make rules and regulations is limited by the authorizing law.

In *Morton v. Ruiz*, 415 U.S. 199, 232, 39 L.Ed.2d 270, 94 S.Ct. 1055 (1973), this Court has found that such rules and policies must be within the constraints of the relevant legislation.

> This agency power to make rules that affect substantial individual rights and obligations carries with it the responsibility not only to remain consistent with the governing legislation, *SMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 36 L.Ed.2d 620, 93 S.Ct. 1773 (1973); *Dixon v. United States*, 381 U.S. 68, 74, 14 L.Ed.2d 223, 85 S.Ct. 1301 (1965); *Brannan v. Stark*, 342 U.S. 451, 96 L.Ed. 497, 72 S.Ct. 433 (1952), *but also to employ procedures that conform to the law. See NLRB v. Wyman-Gordon Company*, 394 U.S. 759, 764, 22 L.Ed.2d 709, 89 S. Ct. 426 (1969) (plurality opinion). *No matter how rational or consistent with Congressional intent a particular decision might be, the determination or eligibility can not be made on an ad hoc basis by the dispenser of the funds.* (emphasis added.)

In *Morton v. Mancari*, 417 U.S. 535, 41 L.Ed.2d 290, 94 S.Ct. 2474 (1974), this Court interpreted the provisions of Section 12 of the Indian Reorganization Act of 1934 (25 U.S.C.S. § 472), which grants to Indians an employment preference in the Bureau of Indian Affairs, and the Equal Employment Opportunity Act of 1972, which forbids discrimination on the basis of race, color, sex or national origin in employment. The Court found that the two laws could be harmonized and that Title VII did not repeal by implication the Indian Reorganization Act of 1934, stating at page 549:

> Appellees encounter head-on the 'cardinal rule . . . that repeals by implication are not favored.' *Posadas v. National City Bank*, 296 U.S. 497, 503, 80 L.Ed. 351, 56 S.Ct. 349 (1936); *Wood v. United States*, 16 Pet at 342-343, 363, 10 L.Ed. 987 (1842); *Universal Interpretive Shuttle Corp. v. Washington Metropolitan*

Area Transit Commission, 393 U.S. 186, 193, 21 L.Ed. 2d 334, 89 S.Ct. 354 (1968).

In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable. *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 456-457, 89 L.Ed. 1051, 65 S.Ct. 716 (1945).

• • •

Furthermore, the Indian Preference statute is a specific provision applying to a very specific situation. The 1972 Act, on the other hand, is a general application. Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment. See, e.g., *Bulova Watch Co. v. United States*, 365 U.S. 753, 758, 6 L.Ed.2d 72, 81 S.Ct. 864 (1961); *Rogers v. United States*, 185 U.S. 83, 87-89, 46 L.Ed. 816, 22 S.Ct. 582 (1902).

• • •

The courts are not at liberty to pick and choose among Congressional enactments, and when two statutes are capable of coexistence, it is the duty of the courts, absent a clear expressed Congressional intention to the contrary, to regard each as effective 'when there are two acts upon the same subject, the rule is to give affect to both if possible . . . the intention of the legislature to repeal 'must be clear and manifest.' *United States v. Borden Co.*, 308 U.S. 188, 198, 84 L.Ed. 181, 60 S.Ct. 182 (1939). In light of the factors indicating no repeal, we simply can not conclude the Congress consciously abandoned its policy of furthering Indian self-government when it passed the 1972 Amendment.

Coincidentally, in June of this year both this Court and the Supreme Court for the State of California grappled with the issue before us and both invalidated attempts to vitiate substantive statutes through restrictions on the

fisc. In the matter of *Mandel v. Myers.* 29 Cal.3d 531 (1981), decided June 18, 1981, the California Supreme Court compelled the state legislature to appropriate specific funds for that state's Department of Health Services in order to pay an award for attorneys' fees previously adjudged in *Mandel v. Hodges,* 54 Cal.App.2d 596 (1976). In reaching its decision, California's Supreme Court reviewed state and federal cases pertaining to the separation of powers and "judicial budgeting" quoting and expounding on the decision in *United States v. Lovett,* 328 U.S. 303, 90 L.Ed. 1003, 66 S.Ct. 817 (1946), as follows at page 541:

> In *Lovett,* the United States Congress, after conducting a summary investigation of a number of federal employees and concluding that several were guilty of "subversive activity," adopted as part of a pending appropriation bill a provision which stated that "[n]o part of any appropriation . . . which is made available under . . . this Act . . . shall be used . . . to pay any part of the salary, or other compensation of the personal services of Goodwin B. Watson, William E. Dodd, Junior, and Robert Morse Lovett . . . ."
>
> Although Congress argued in *Lovett* that the provision in question "involved simply an exercise of congressional powers over appropriations which . . . are plenary and not subject to judicial review" (328 U.S. at pp. 306-307), the Supreme Court emphatically rejected the argument and concluded that the restriction in question amounted to a punitive bill of attainder which the Legislature was not authorized to enact. (U.S. Const., art. I, § 9, subd. (3).) Having determined that the *attempted limitation on the use of appropriated funds rested upon the improper exercise of legislative authority,* the *Lovett* court struck down the restriction and held that the challenged provision "does not stand as an obstacle to the payment of com-

pensation to Lovett, Watson and Dodd." (328 U.S. at p. 318.) *Ibid* at 14-15 (Slip Opinion—6/18/81) (emphasis supplied).

With equal force in the case before us, it can be argued as it was by the District Court, that short of repeal of section 248a, that any limitation for funding for services mandated under section 248a would be an "improper exercise of legislative authority."

By the same token, this Court in *American Textile Manufacturers Institute, Inc. v. Donovan*, 49 LW 4720, decided June 16, 1981, held that the promulgation of safety standards under OSHA could not be conditioned or nullified by a cost-benefit analysis without vitiating the very protections sought by the standards. *Ibid* at 4726. Petitioners in that case argued that the language of OSHA section 6(b)(5) requiring the Secretary to adopt safety standards which most adequately assure, "to the extent feasible," that an employee's health will not be impaired, required that the Secretary demonstrate such standards be cost effective before promulgation. *Ibid* at 4724.

The Court rejected petitioner's argument based on a review of the legislative history of OSHA and the absence of any suggestion that cost considerations be given priority over worker safety. More relevant to the case before us, the Supreme Court noted that where an extension of benefits is intended by Congress to be conditioned on costs, "it has clearly indicated such intent on the face of the statute." *Ibid* at 4725.

By way of summary, therefore, given the dearth of evidence of Congressional intent to repeal the statutory entitlements of section 248a through the enactment of P.L. 97-12, the District Court was correct in finding that respondents are obligated to fund and provide the health care services mandated thereunder.

II

EXPENDITURES FOR SUPPORT OF THE STATUTORY ENTITLEMENTS OF SECTION 248a ARE AN OBLIGATION "AUTHORIZED BY LAW" AND EXEMPT FROM THE PROVISIONS OF THE ANTI-DEFICIENCY ACT, 31 U.S.C. § 665(a).

Respondents alternative defense to its violation of Section 248a rests upon the provisions of the Anti-Deficiency Act and their depleted fisc. This reliance, however, is misplaced since the Act specifically excludes expenditures when necessary to meet an obligation "authorized by law." Subsection (a) of 31 U.S.C. § 665, reads as follows:

> Expenditures or Contract Obligations in Excess of Funds Prohibited:
>
> (a) No officer or employee of the United States shall make or authorize an expenditure from or create or authorize an obligation under any appropriation or fund in excess of the amount available therein; nor shall any such officer or employee involve the Government in any contract or other obligation, for the payment of money for any purpose, in advance of appropriations made for such purpose, *unless such contract or obligation is authorized by law.* (emphasis supplied)

As emphasized and specified by the concluding words of subsection (a), the prohibitions of the Anti-Deficiency Act are inapplicable where the "contract or obligation is authorized by law." Thus, by statutory conclusion, the subject controversy before this Court is exempt from the Act since the delivery of health care to merchant seamen has already been determined to be an obligation "authorized by law." *Seafarers' International Union of North America v. Weinberger,* 363 F.Supp. 1053, 1060 (D.C. D.C. 1973) [Conclusion of Law No. 4].

The Court of Claims in *New York Airways, Inc. v. United States*, 369 F.2d 743 (Ct. Cl. 1966), was confronted with a factual situation substantially identical with the present case. The issue before the Court of Claims was whether the Federal Aviation Act obligated the Civil Aeronautics Board to honor subsidy agreements with private helicopter companies "even in the absence or deficiency of a Congressional appropriation." The court observed as follows:

> The key questions are (1) whether the particular wording of the Act empowers the Board to obligate the United States for the payment of an agreed subsidy in the absence or deficiency of a congressional appropriations, and (2) whether an appropriation act amended the basic Act with respect to the Board's rate-making power. The plaintiffs prevailed as to each of these issues. *Ibid* at 744-745.
>
> . . .
>
> The case law supports the plaintiff's position as to the effect of section 406(c) of the Act. *It has long been established that the mere failure of Congress to appropriate funds, without further words modifying or repealing, expressly or by clear implication, the substantive law, does not in and of itself defeat a Government obligation created by statute.* (citations). . . . The failure to appropriate funds to meet statutory obligations prevents the accounting officers of the Government from making disbursements, but such rights are enforceable in the courts. (citations) Where, however, a construction contract expressly provided that the quantities of work ordered shall be kept 'within the limits of available funds,' and a statute prohibited obligating the Government to pay a larger sum for any public improvement than covered by a specific appropriation, extra work ordered and performed in excess of the appropriation was held not to create an obligation against the Government enforceable in the courts.

Sutton v. United States, 256 U.S. 575, 65 L.Ed. 1099, 41 S.Ct. 563 (1921). *The injunction in the Sutton contract that work was to be kept 'within the limits of available funds' was, when coupled with the public statute excluding any obligations for work in excess of appropriations, a much more positive prohibition than the dispute language in section 406(c) of the Act under consideration. . . . Ibid* at 748 (emphasis supplied)

. . .

Despite these indications of Congressional intention to curtail and finally eliminate helicopter subsidies, it is equally manifest that throughout the years in question the key congressmen who spoke on the subject fully understood that the commitment to pay subsidy compensation decreed by the Board for helicopter carriers was a binding obligation of the Government in the courts even in the failure of Congress to appropriate the necessary funds. (citations) *It is readily apparent from these remarks that in curtailing the subsidy appropriations for helicopter carriers, Congress was well aware that the obligation to pay the subsidy rates set by the Board could not be eliminated without changing section 406 of the Federal Aviation Act of 1958.* The right of the carriers to resort to the Court of Claims for recovery was recognized. Significantly, the defendant has not countered this evidence of congressional misgivings. *Ibid* at 751 (emphasis supplied).

The defendant finally relies on 31 U.S.C. § 665(a) to make invalid the contract created with plaintiff by the Board's rate order. The statute provides:

> (a) Expenditures or contract obligations in excess of funds prohibited. No officer or employee of the United States shall make or authorize an obligation under any appropriation or fund in excess of the amount available therein nor shall any such officer or employee involve the Government in any

> contract or other obligation, for the payment of money for any purpose, . . . *unless such contract or obligation is authorized by law.* (emphasis in original).
>
> *Since it has been found that the Board's action created a 'contract or obligation [which] is authorized by law' obviously the statute has no application to the present situation, unlike the case in City of Los Angeles v. United States,* 68 F.Supp. 974, 107 Ct. Cl. 315 (1946), where the Department of the Interior had no statutory authorization and was thus invalid. (emphasis supplied).

Further, Petitioner would note that in the debate regarding the Administration's budget rescissions (H.R. 3512), the Congress has specifically refrained from implicitly repealing Public Law 93-155 and has, indeed, confirmed continued entitlement of merchant seamen to health care as reflected in the following exchange:

> Subcommittee on Human Services—May 12, 1981; Congressional Record—House, pg. 2098:
>
> Mr. JONES of North Carolina. Mr. Chairman, I would like to ask a question or two of the subcommittee chairman, the gentleman from Kentucky. (Mr. Natcher). I would like to ask if there is language or a provision in H.R. 3400, now H.R. 3512, which would cause or provide for the closing of public health hospitals; and is it not true that it takes other congressional action to change the existing laws?
>
> Mr. NATCHER. Mr. Chairman, if the gentleman from North Carolina will yield to me at this point, I would like to advise the gentleman that *there is nothing in H.R. 3512, the bill that we have before the committee at this time, which reduces the entitlement of merchant seamen to free care. These are matters, I would like to advise the gentleman from North Carolina, that would have to go before the proper authorizing committees.* (emphasis supplied)

In meeting respondents defense of poverty to comply with the implicit funding mandate of section 248a, it is well to note that their poverty is completely self-induced. Notwithstanding the fact that Congress appropriated sufficient funds to meet the Department's obligations under section 248a, respondent Secretary Schweiker saw fit on February 27, 1981, to request rescission of $37 million of fiscal 1981 funds, thereby creating the predicament of which respondents so roundly decry. If this Court allows respondents to evade their legislative and judicial obligations by merely defunding the very programs they are commanded to implement, then we place the legislative and executive branches at dagger points and create a precedent that will be the ruin of constitutional government.

In whatever financial posture respondents have placed themselves, they possess the key to their release through the mechanism of a supplemental budget request. See: 31 U.S.C. § 14 (Supplemental Budget Requests). Since the inception of the budgetary process, with a regularity unknown in the natural order, Congress has annually enacted a supplemental budget to meet the unanticipated shortfalls of the prior budget. An examination of these supplementals as they have impacted upon the Department of Health and Human Services (formerly HEW), reflects that in almost every instance the specified supplementals are necessitated to meet the regulatory and statutory mandates imposed on the Department by no end of legislation.[2] In fact, the provisions of 31 U.S.C. § 665(e)(1), (2), concerning supplemental appropriations to meet deficiencies, would seem to mandate that the Secretary transmit forthwith "any deficiency or supplemental estimates" necessary to fund

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[2]Past supplementals have proven to be an unlimited source of funding to the Department where necessary to fulfill program commitments, e.g.: Supplemental Appropriations and Rescission Act of 1980 (HHS-P.L. 96-394; 94 Stat. 857: $3,256,650,000); Supplemental Appropriations Act of 1979 (HEW-P.L. 96-38; 93 Stat. 97: $143,190,000); Supplemental Appropriations Act of 1978 (HEW-P.L. 05-240); 92 Stat. 107: $137,719,000).

section 248a, which funding necessarily involves "the safety of human life . . . or the immediate welfare of individuals in cases where an appropriation has been made to enable the United States to make payment of . . . sums which are required to be paid . . . by law." 31U.S.C. § 665(e)(1).

In sum, the funding obligations imposed by section 248a are "authorized (and) . . . required by law," and thus exempt from the funding proscriptions of the anti-deficiency statutes. See also: *Martinez v. Dunlop,* 411 F. Supp. 5, 9 (N.D. Ca. 1976), affirmed, 573 F.2d 555 (9th Cir. Cal. 1978) [the cost of rectifying a legal wrong should not insulate the wrongdoer from having to correct illegal actions].

III

MERCHANT SEAMEN'S STATUTORY RIGHTS TO FREE HEALTH CARE ARE PROTECTABLE INTERESTS WITHIN THE PURVIEW OF THE FIFTH AMENDMENT

It is well to repeat the fact that we are confronted with the disestablishment of a statutory scheme for providing free medical care to merchant seamen that has existed from the very beginnings of this country. It is not an exaggeration to say that since the adoption of a marine hospital system by Congress on July 16, 1798 (1 Stat. 605), merchant seamen have rightfully come to rely upon this system as the primary source of their medical care and treatment. Indeed, this provision is only one of many elements which have historically gone to clothe the merchant seamen with the statutory status of "ward of the legislature." *Norris,* The Seaman As Ward of the Admiralty, 52 Mich. L. Rev. No. 4, Feb. 1954, pp. 479-504; *M/V Albacora v. Rawlins,* 262 F.2d 130, 132 (5th Cir. C.Z. 1959). Practically every phase of a seamen's life has been accorded legislative attention from the day he first ships out as an ordinary seamen to the disposal of his estate at death. See generally: 46 U.S.C. §§ 541-713.

At all events, by virtue of their "ward" status, merchant seamen have acquired a proprietary right to the continued

provision of free medical care and other subsistence rights which are protectable under the Fifth Amendment against arbitrary executive withdrawal in the fashion and manner effected herein. This assertion is in keeping with a growing awareness that vital governmental services for identifiable individuals are affirmative rights and protectable interests within the purview of the Fifth Amendment, which cannot be withdrawn or curtailed without compliance with the highest standards of administrative and procedural due process. See: Tribe, Unraveling National League of Cities: The New Federalism and Affirmative Rights To Essential Government Services, 90 Harv. L. Rev. 1065 (1977).

This concept of affirmative rights to vital government services is a doctrinal expression generated by a range of case holdings sustaining the individual's right to "vital" services free from summary and arbitrary termination thereof; as in the case of welfare benefits [*Shapiro v. Thompson,* 394 U.S. 618, 22 L.Ed.2d 600, 89 S.Ct. 1322 (1969), free medical care [*Memorial Hospital v. Maricopa County,* 415 U.S. 250, 39 L.Ed.2d 306, 94 S.Ct. 1076 (1974)], and food stamps [*Rodway v. Department of Agriculture,* 514 F.2d 809 (D.C. Cir. 1975)]. Such termination of services has been found to be arbitrary and offensive to the principles of due process where that termination fails either to: (1) provide, as a precondition to the deprivation of the challenged service, an adversary hearing for determination of the merits of such termination; *Goldberg v. Kelly,* 397 U.S. 254, 263-264; 25 L.Ed.2d 287; 90 S.Ct. 1011 (1970); or (2) fails to meet the legitimate expectations of individual beneficiaries to administrative or procedural due process [*Arnett v. Kennedy,* 40 L.Ed.2d 15, 94 S.Ct. 1633; 416 U.S. 134, 151-153 (1974)].

Measured by this view of due process rights to government services, a merchant seaman's claims to continued free medical care and treatment pursuant to 42 U.S.C. § 248a clearly qualifies as a need-benefit that cannot be

unilaterally terminated without procedural protection. *Memorial Hospital v. Maricopa County, supra.* Yet, the Executive Branch has terminated the eligibility of petitioner's class of merchant seamen to free medical care through the stratagems of executive defunding and closure regulations. Respondents have denied merchant seamen their constitutional rights to due process under the Fifth Amendment by failing to provide petitioner's class a procedural forum for the determination of their overall and continued need for free medical care. The rigors and exigencies of employment as a merchant seaman are self-evident as are difficulties and improbabilities faced by the private sector in appropriately providing for an injured or ill seaman free of cost. See: *Mathews v. Eldridge, supra,* at 342. The contributions of merchant seamen to the security and commerce of this country surely allow them to claim the basic right to be heard before being condemned to grievous loss. *Joint Anti-Fascist Comm. v. McGrath,* 341 U.S. 123, 168, 95 L.Ed. 817, 71 S.Ct. 624 (1951); *Armstrong v. Manzo,* 380 U.S. 545, 552, 14 L.Ed.2d 62, 85 S.Ct. 1187 (1965).

Futhermore, respondents' actions contravene the legitimate expectations of petitioner's class that respondents would secure compliance with the outstanding statutory pre-requisites to their defunding and regulatory actions. More specifically, petitioner's class was constitutionally entitled to expect compliance by respondents with the controlling provisions of the Reorganization Act of 1949, as amended, 5 U.S.C. §§ 901-913, and the Congressional Budget and Impoundment Act of 1974, 33 U.S.C. § 1402.

Congress has long recognized that an essential element of any legislative program must be the organization and characteristics of the executive agencies responsible for carrying out that program. Accordingly, Congress has required that no executive agency reorganization, including transfer or abolition of particular programs or parts of

any agency, can become effective absent prior Congressional authorization. Reorganization Act of 1949, as amended, 5 U.S.C.A. §§ 901-913. *Seafarers' International Union v. Weinberger, supra* at 1060. Under the Reorganization Act, "Whenever the President, after investigation, finds that changes in the organization of agencies are necessary" to carry out the purposes of the statute—including promotion of governmental efficiency and the reduction of expenditures—*"he shall prepare* a reorganization plan." 5 U.S.C.A. § 903(a) (emphasis added). Such a reorganization plan must be submitted to Congress for its evaluation and cannot become effective for at least sixty days after submission; *either House* of Congress can prevent the plan from taking effect by passing a simple resolution during this sixty-day period. 5 U.S.C.A. §§ 903, 905. This legislative scheme, delegating to the President the power to initiate reorganization plans, but forbidding him from implementing such plans until after a period for Congressional consideration, has been repeatedly upheld by the courts. See *Swayne v. Hoyt, Ltd. v. United States,* 300 U.S. 297 (1937); *Isbrandtsen-Mollen v. United States,* 14 F. Supp. 407 (S.D.N.Y. 1936), aff'd, 300 U.S. 139 (1937); See also Justice Department Memorandum *Re Constitutionality of Provisions in Proposed Reorganization Bills Now Pending in Congress,* S. Rep. No. 232, 81st Cong., 1st Sess. 19-20 (1949).

Respondent Schweiker is presently in the process of "abolishing" the USPHS hospital system completely. Even the most cursory reading of the Reorganization Act demonstrates that this type of unilateral executive action is expressly forbidden.

Likewise, the statute defines "reorganization" in the broadest possible manner, so as to include any "transfer, consolidation, coordination, authorization, or *abolition* . . . of the whole or part of an agency, or of the whole or a part of the functions thereof." 5 U.S.C.A. §§ 902(2),

903(a)(1) (emphasis added). Respondent Schweiker admits that his current intention is to transfer or abolish the whole of the USPHS hospital system. This acknowledged abolition of the USPHS hospital system clearly meets the Reorganization Act test of "abolition . . . of the whole or a part of the functions" of an agency.

It must also be recognized that the minimal due process rights afforded petitioner's class by the Congressional Budget and Impoundment Act of 1974 were likewise circumvented. In stated compliance with the provisions of that statute, the President of the United States did on March 19, 1981, propose to Congress certain budget rescissions concerning the Department of Health and Human Services rescinding a sum of $11,616,000 for the balance of FY 1981. Exhibit F to Bachman Declaration (NR 17). This budget message, though in undated form in the Bachman Declaration, was published in the Federal Register, Tuesday, March 24, 1981. Fed. Reg., Vol. 46, No. 56, pp. 18478, 18497.

As provided under 31 U.S.C. § 1402(b), "Any amount of budget authority proposed to be rescinded or that is to be reserved as set forth in such special message *shall* be made available for obligation *unless, within the prescribed 45-day period, the Congress has completed action on a rescission bill rescinding all or part of the amount proposed to be rescinded* or that is to be reserved." (Emphasis supplied).

A period in excess of 45 days elapsed since the March 19th announcement in the Federal Register to the adoption of P.L. 97-12 on June 4, 1981, hence the funds sought to be rescinded thereby are deemed obligated to the continued funding of health care and treatment for merchant seamen pursuant to the mandatory provisions of 42 U.S.C. §§ 248a and 249.[3] 31 U.S.C. § 1402; *State of Maine v. Goldschmidt,*

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[3] "Any special message transmitted under section 1402 . . . shall be printed in the first issue of the Federal Register published after such transmittal." 31 U.S.C. § 1404(e).

494 F.Supp. 93, 98 (D.C. Me. 1980) [a "rescission" . . . must be affirmatively approved by both Houses of Congress within 45 days]. The fact that enforcement of this process has been delegated to the Comptroller General, under the provisions of 31 U.S.C. § 1406, and is not otherwise enforceable by the private citizen, does not in any way diminish the efficacy of this argument since petitioner's class of merchant seamen as "wards of the legislature" were legitimately entitled to expect the compliance of respondents and Congress with the budgetary process.

In sum, under any view of the evidence, merchant seamen's statutory rights to free health care are protectable interests within the purview of the Fifth Amendment and respondents' denial of such care herein was violative of the protection afforded by this Amendment.

CONCLUSION

For all of the foregoing reasons, this Court should grant certiorari.

DATED: September 3, 1981

Respectfully submitted,

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Appendix A

United States Court of Appeals
For the Ninth Circuit

No. 81-4295

Sailors' Union of the Pacific, AFL-CIO,
Plaintiffs,

vs.

Richard S. Schweiker, Secretary of the Department of Health and Human Services of the United States, et al.,
Defendants.

[Filed June 24, 1981]

Before: CHOY, ALARCON, and NORRIS, Circuit Judges

Order

Appellants appeal from the district court's grant of a preliminary injunction Oral argument on the appeal and renewed motion for stay was heard before this panel on Tuesday, June 23, 1981. The judges heard presentations by both counsel, Richard de St. Phalle for appellants and John Henning for appellee.

The court, having considered the matter, finds that the district court abused its discretion in granting a preliminary injunction. The balance of hardships in this case tips in favor of appellants who serve as trustees of the funds allocated by Congress for the benefit of all persons entitled

to medical care at the Public Health Service hospitals and clinics. Moreover, a greater public interest is served in keeping the hospitals and clinics open longer to serve all of the beneficiaries than in keeping them open for a shorter time to provide American seamen with full services. In addition, we disagree that appellee demonstrated a substantial likelihood of success on the merits before the district court. An appropriations measure can suspend the operation of or rescind by implication a substantive law. *United States v. Will,* 101 S.Ct. 471 (1980); *Skoko v. Adams,* 638 F.2d 1154 (9th Cir.), *cert. denied,* 100 S.Ct. 266 (1979). Congress has spoken with sufficient clarity in enacting P.L. 97-12 to suspend the operation of or rescind 42 U.S.C. § 248a.

Therefore, the court vacates the preliminary injunction issued on June 4, 1981 and remands the case to the district court for further proceedings. The renewed motion of appellant for stay pending appeal is denied as moot.

Judge Norris dissents from this order and will file a dissent in due course.

Appendix B

United States Court of Appeals
For the Ninth Circuit

No. 81-4295

Sailors' Union of the Pacific, AFL-CIO,
Plaintiffs,

vs.

Richard S. Schweiker, Secretary of the Department of Health and Human Services of the United States, et al.,
Defendants.

[Filed June 25, 1981]

Before: CHOY, ALARCON, and NORRIS, Circuit Judges

NORRIS, J. dissenting:

Dissent

I disagree with the majority's finding that the district court abused its discretion in issuing the preliminary injunction. I believe that the appellee has demonstrated at least "a fair chance" of ultimately prevailing on the merits. *See Benda v. Grand Lodge of International Association of Machinists*, 584 F.2d 308, 315 (9th Cir. 1978), *cert. dismissed*, 441 U.S. 937 (1979).

Section 248a of Title 42 expressly provides that the Secretary of Health & Human Services may not close or trans-

fer a Public Health Service hospital or reduce the level and range of health care services below the level provided as of January 1, 1973, unless Congress by law specifically authorizes such action.

The issue before us is not whether Congress has the power to repeal § 248a, but whether Congress, in appropriating money to fund the Public Health Service program, or in rescinding an existing appropriation by $49,776,000, has expressed with the requisite clarity an intent to repeal the entitlement explicitly provided for in § 248a.

I have difficulty with the proposition implicit in the majority's order that the judiciary should read into an appropriations bill, which merely specifies the amount of funds available to the program, an intent to repeal an explicit entitlement. If such is Congress' intent, it would be a simple matter for Congress to say so. Neither the language of P.L. 97-12 nor its legislative history reflects a clear congressional intent to reduce health services below the minimum levels mandated by 42 U.S.C. § 248a.

United States v. Will, 49 USLW 4045 (Dec. 15, 1980) and *Skoko v. Andrus*, 638 F.2d 1154 (9th Cir.), *cert. denied*, 100 S. Ct. 266 (1979) are readily distinguishable. In both *Will* and *Skoko*, the subsequent legislation expressly reduced the prior entitlements. In *Will*, Congress explicitly provided that previously authorized cost-of-living increases will not take effect, 49 USLW at 4051, and in *Skoko*, Congress, by subsequent legislation, expressly limited the county's share of the contested revenues. 638 F.2d at 1157. No such comparable provisions appear in P.L. 97-12. Moreover, neither a subsequent congressional nullification of

previously authorized judicial salary increases nor a congressional reduction of a county's share of revenues from condemned land will work the type of "immediate and irreparable damage" that would be suffered by seamen who are deprived of their statutory entitlement to medical care.

The rule of *Morton v. Ruiz*, 415 U.S. 199 (1974), that the Secretary may promulgate reasonable classifications and eligibility requirements in order to allocate the limited funds available to him is also inapplicable here. The Secretary of Health & Human Services is statutorily required in this case to provide a minimum level and range of services. The statute involved in *Ruiz* did not have a similar mandate. Moreover, the Court in *Ruiz* stated that agency power to make rules that affect "substantial individual rights and objections" must "remain consistent with the governing legislation." *Id.* at 232. P.L. 97-12 clearly does not comply with the specification requirement in § 248a.

Furthermore, there is no support for the majority's conclusion that the balance of hardships tips in favor of appellant. The history of the United States Public Health Service hospital system dates back to 1798 when Congress first established a marine hospital to provide medical care and treatment for sick and disabled seamen. Act of July 16, 1798, 1 Stat. 605. The Public Health Service has traditionally provided contract patient care. For over two hundred years the merchant seamen, in particular, have relied on such services for adequate health care. It hardly needs be said that the termination or suspension of such health care will deprive the seamen of an essential service. The hardship on the appellants, on the other hand, is largely speculative. It assumes, without justification, that the result

of the district court injunction would be an early closing of the PHS hospitals and clinics.

Whether or not to let the hospitals close if the Secretary runs out of money because he must maintain the 1973 level of services is a decision for the Congress to make. What this case really seems to be all about is that the Secretary, like Chicken Little, is proclaiming that the sky is falling rather than exercising his right, indeed his duty, to request a supplemental appropriation to cover the shortfall.[1] The decision would then be squarely in Congress' lap, where it belongs. Congress may indeed let the sky fall, which is its prerogative, or it may, more realistically, either vote a supplemental appropriation or explicitly repeal § 248a and provide for the reduction of the level of services in a fair and orderly manner.

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[1]The language of § 248a is explicit that the Secretary must act to provide "for *all* categories of individuals entitled or authorized to receive care" (emphasis added). These beneficiaries include not only merchant seamen, but also military dependents and retirees, native Americans, and lepers. 52 U.S.C. § 254(a), 10 U.S.C. § 1071 *et. seq.*, 25 U.SC § 13. The district court in its order of preliminary injunction prohibited the Secretary from taking any action that would reduce medical care below the level available in 1973. The injunction preserves the entitlement of all the beneficiaries under § 248a. It is therefore difficult to understand the majority's attempt to distinguish the seamen from other beneficiaries.

Appendix C

United States District Court
Northern District of California

No. C-81-2079 RPA

Sailors' Union of the Pacific, AFL-CIO,
Plaintiff,

vs.

Richard S. Schweiker, Secretary of the Department of Health and Human Services of the United States; Leonard Bachman, Assistant Surgeon General of the United States; Truman L. McCasland, Director, United States Public Health Services Hospital, San Francisco,
Defendants.

[Filed June 4, 1981]

Order Granting Motion For Preliminary Injunction

Plaintiff, Sailors' Union of the Pacific, brings this action on behalf of a class of its seamen members, and all others similarly situated, who are entitled to free medical care from the United States Public Health Service. Plaintiff seeks injunctive relief to restrain and enjoin defendants Schweiker (the Secretary of the Department of Health and Human Services), Bachman (Assistant Surgeon General) and McCasland (Director of the U.S. Public Health

Service Hospital in San Francisco) from acting in violations of provisions of the Public Service Act of 1944 (42 U.S.C. § 249) and Public Law 93-155 (42 U.S.C. § 248a), and the Reorganization Act of 1949 (5 U.S.C. § 903) by their unlawful closure of the U.S. Public Health Services hospitals and outpatient clinics nationwide, and by their unlawful reduction or termination of health care services for merchant seamen.

42 U.S.C. § 249 provides that certain types of seamen, including merchant seamen, are entitled to medical, surgical and dental treatment and hospitalization without charge at hospitals and other stations of the U.S. Public Health Service (hereinafter referred to as "PHS"). Currently, the PHS maintains eight hospitals and twenty-seven clinics where seamen can receive such free medical care. In addition to medical care at these hospitals and clinics, seamen can receive medical treatment at medical facilities other than those of the PHS where the required medical facilities or services are not provided by the PHS, or in case of emergency. Such medical care is entitled "contract" patient care.

On February 26, 1981, President Reagan submitted to Congress a budget which requested drastic reductions in expenditures by the PHS, for the stated purpose of closing all PHS hospitals, clinics and other facilities, and terminating free health services for merchant seamen. On the same day a bill was introduced by Congressman Madigan in the House of Representatives which would abolish free medical care for merchant seamen, and repeal the hospital closure provisions of 42 U.S.C. § 248a.

On April 23, 1981, defendants Schweiker and Bachman formulated and adopted a "closure policy" which directed all directors of PHS facilities to cease new admissions by the end of the fiscal year, and provided that effective October 31, 1981, the PHS system would be closed.

On May 8, 1981, defendant Schweiker gave notice that effective immediately, contract patient care would be curtailed, and available only for a "life-threatening emergency." The defendants claim that this action was taken because there were insufficient funds to maintain the PHS system for the balance of the fiscal year without reducing or eliminating some programs; as contract services are discretionary. The reduction releases funds that can be used to continue to operate the PHS hospitals and clinics, which the defendants admit they are required by law to do. Defendants state that the PHS budget for the 1981 fiscal year of $126,695,000 (P.L. 96-369) was not sufficient to maintain the services being rendered at PHS facilities without reductions and eliminations in some programs, and further, rather than receiving additional funds to make up the balance needed, the House and Senate Appropriations Committees and the Joint Congressional Conference Committee have recommended $34 to $38 million recission in the PHS 1981 budget for the rest of the fiscal year. The Committees also recommend an appropriation of approximately the same dollar amount to be allocated to the costs and expenses of closing the PHS system.[1]

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[1]It should be noted that just before the hearing of this matter the full House of Representatives approved a recission and allocation similar to those recommended by the committees mentioned above. Defendants assert that similar action by the full Senate is imminent.

Upon plaintiff's application, the Court issued a temporary restraining order based upon a finding that immediate and irreparable injury was likely to result to plaintiffs. (F.R.C.P. 65(b).) The bases for the Court's finding of irreparable injury were:

(1) there has been a deprivation, and there is further threatened deprivation, of essential medical care which seamen have come to depend on;

(2) care required by the statute will not be assured;

(3) the health and medical welfare of seamen will be put in jeopardy;

(4) as to contract patient benefits, there is a deprivation of medical care to seamen not in the vicinity of public health service facilities which could seriously endanger their health.

The temporary restraining order maintained the status quo that existed before the defendants commenced their activities of reducing services and taking steps to close the PHS facilities. The temporary restraining order restrained defendants from:

(1) taking any action which would limit, inhibit or in any manner deny medical care, treatment, or admission at the USPHS Hospital at San Francisco, or any other USPHS hospital or outpatient clinic, to any persons presently authorized or entitled to receive such care and treatment, until such time as the defendants shall fulfill all the requirements of Public Law 93-155, Title VIII, Sec-

tion 818(a) and (b), 42 U.S.C. § 248a and of the Reorganization Act of 1949, 5 U.S.C. §§ 901-913;

(2) taking any action which would limit, inhibit or in any manner reduce the level, quality and standard of health care services, including contract patient care services, below that level, quality and standard provided on January 1, 1973, until such time as the defendants shall fulfill all the requirements of Public Law 93-155, Title VIII, Section 818(a) and (b), 42 U.S.C. § 248a, and of the Reorganization Act of 1944, 5 U.S.C. §§ 901-913.

This action is now before the Court on a plaintiff's motion for a preliminary injunction which seeks the same restraints that were provided by the temporary restraining order.

In order for the Court to issue the preliminary injunction there must be a clear showing that either:

(1) there is a probability of success by plaintiff on the merits *and* possible injury to plaintiff, or

(2) there are sufficiently serious questions going to the merits to make the questions a fair ground for litigation *and* a balance of hardships that tip decidedly toward plaintiff.

Aguiere v. Chula Vista Sanitary Service, 542 F.2d 799, 781 (9th Cir. 1976). Only one of these tests need be satisfied, and the tests have been described as "extremes of a single continuum." *Bend v. Grand Lodge of International Association,* 584 F.2d 308, 315 (9th Cir. 1978). Thus, where there is a compelling likelihood of success on the merits, the injury to the party seeking relief need be only "possible,"

but where the likelihood of success is less clear (but still a fair ground for litigation), greater potential harm to the party seeking relief is required as compared to any harm possibly coming to the defendant. Additionally, the public interest must be considered, and the Court may not grant an injunction, even where the likelihood of success is great, where to do so would be harmful to the public interest. *Yakus v. U.S.*, 321 U.S. 414, 440 (1943).

The Court notes that a grant or denial of a preliminary injunction will generally be overturned on appeal only where there is an abuse of discretion. However, a "more narrow abuse of discretion applies in such a circumstance." *Miss Universe, Inc. v. Flesher*, 605 F.2d 1130, 1133 (9th Cir. 1979). This more narrow standard of review exists because the parties have not had a full opportunity to either develop or present their cases, because the Court will have had only a brief opportunity to consider the different factors relevant to the issues before it, and because the preliminary injunction merely maintains the status quo and does not prejudice the merits of the lawsuit before a final decision is made. *Id.* These factors are especially important in this case: the defendants submitted their voluminous opposition papers (which incidentally are the first papers they have ever submitted in the action), just twenty-four hours before the hearing, and would not agree to a time extension of the temporary restraining order.

The Court finds that a preliminary injunction restraining defendants from closing PHS hospitals, clinics, and other facilities, or from taking steps in that direction, is clearly proper. Plaintiff here made a clear showing of a probability

of success on the merits and of possible injury, in fact irreparable injury, to the plaintiff class. *Aguiere v. Chula Vista Sanitary Service*, 542 F.2d at 781.

In 42 U.S.C. § 249 Congress provided that seamen shall be *entitled* to medical care at hospitals and other stations of the PHS without charge. In 42 U.S.C. § 248a Congress provides that the Secretary of Health and Human Services shall take such action as may be necessary to assure that the eight PHS hospitals shall continue in operation and provide care and treatment at a level and range at least as great as the level and range those services were providing on January 1, 1973. 42 U.S.C. § 248a(a). This statute also provides that the Secretary may only close the hospital or reduce the health care services provided therein "if Congress by law . . . specifically authorizes such action." 42 U.S.C. § 248a (b)(1). In addition to specific Congressional authorization, to take the above actions in compliance with the Act the Secretary must submit to Congress a copy of the written, unqualified approval of the proposal submitted by the State and areawide health planning agencies whose plans cover the area in which the hospital is located. 42 U.S.C. § 248a (b)(2).

In the present case, there has been no specific authorization by Congress to close any hospitals. Even if the budgetary recommendations are passed by Congress, such actions do not specifically authorize hospital closings, nor specify what hospitals may be closed. Further, there have been no approvals by State and regional health planning agencies. Thus, the mandatory provisions of section 248a have not been complied with.

There is a proposed bill that will repeal these provisions of section 248a. If the statute is repealed, obviously its mandatory provisions for hospital closures need not be followed. But this bill is far from passage and enactment. Until section 248a is repealed, its provisions are law. As Congress has provided a specific method for closures, and it has not been repealed, the Secretary of Health and Human Services must fully comply with it. Further, Congress must comply with its own mandatory provisions until repealed. Congress cannot impliedly, by budget cuts, be allowed to accomplish what it has provided a specific procedure to accomplish.

Defendants' only opposition to this aspect of the preliminary injunction is their assertion that the levels and ranges of care and treatment that existed in 1973 have already been met for 1981. Defendants set forth quantitative figures, such as the number of patients treated, to support this claim. The Court believes that the requirement of maintaining the "level and range" of services existing on January 1, 1973, should be looked at qualitatively and not quantitatively. Defendants could not rationally assert, for example, that because the quantitative equivalent of services have already been rendered, the PHS system could completely shut down for the last three months of the year and still be considered to be maintaining services at a level and range as they existed on January 1, 1973. Thus, the contention is without merit.

In partial conclusion, plaintiff shows a great likelihood of success on the merits. It appears that upon a trial of this matter plaintiff can succeed in requiring defendants to

fully comply with the mandatory requirements of 42 U.S.C. § 248a before they can take any steps to close PHS hospitals and facilities.[3]

As there is a great likelihood of success on the merits, plaintiff need show only "possible injury." For the same reasons that the Court found irreparable injury supporting issuance of the temporary restraining order, the Court now finds possible, in fact possible irreparable, injury to plaintiff. (Please refer to the previous discussion.) (It should be noted that defendants have made no showing of any harm that could come to the public in being required to continue to maintain services at the hospitals and clinics.

For the above reasons, the Court will issue a preliminary injunction restraining defendants from taking any actions that will inhibit medical care at any PHS hospital or facility or reduce care at such locations below that level and range provided on January 1, 1973, until Congress has complied with, or repealed, 42 U.S.C. § 248a.

The Court further orders that a notice be placed in all PHS facilities, together with a copy of the preliminary injunction, informing patients and personnel that the facilities cannot be closed until Congress complies with, or re-

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[3]It should be noted that section 248a does not specifically address PHS facilities other than hospitals (such as the 27 clinics). However, both parties have, in their discussions, grouped the hospitals and clinics together. Given the clear entitlement to free medical care at PHS facilities stated in 42 U.S.C. § 249 (termed "other stations" in the statute), such a grouping is proper, and the Court sees no problem in including PHS facilities, in addition to hospitals, within this portion of its preliminary injunction order.

peals 42 U.S.C. § 248a. This is ordered because it appears from the record before this Court that the prior actions of defendants have already had an adverse effect upon the maintenance and operation of the affected hospitals, including a substantial impact upon the ability of the hospitals to retain their present staffs. *Seafarers International U. Of No. America v. Weinberger,* 363 F. Supp. 1053, 1060 (D.D.C. 1973). This action may not reverse the problem created, but it will hopefully be of some help.

While 42 U.S.C. § 249 provides that seamen are *entitled* to medical care at PHS hospitals and facilities, 42 U.S.C. § 249(a), subsection (e) of that section provides:

> Persons entitled to care and treatment under subsection (a) of this section . . . may, in accordance with regulations, receive such care and treatment at the expense of the Service from public or private medical or hospital facilities other than those of the Service, when authorized by the officer in charge of the station at which the application is made.

Thus, contract care appears to be discretionary due to the use of the word "may" and because the statute authorizes the Secretary to establish regulations as to when contract care will be allowed.

The Court also finds that a preliminary injunction restraining defendants from acting in a manner other than fairly and honestly in authorizing contract care is clearly proper. The Court finds plaintiff clearly shows that there are sufficiently serious legal questions raised that provide a fair ground for litigation, and the balance of hardships tips decidedly toward plaintiff. *Aguiere v. Chula Vista Sanitary Service, supra,* at 781.

Further, 42 U.S.C. § 248a does not specifically apply to contract care.

Since contract services are discretionary, and there are apparently no specific procedural requirements mandated before alteration can be made to when contract services will be provided, likelihood of success on this portion of plaintiff's complaint is somewhat weak. However, the Court finds that there are certain other factors that raise serious legal questions that provide a fair ground for litigation, which the Court feels should be litigated. There are serious questions as to whether there are any vested legal rights in receiving contract care, considering the fact seamen have been permitted contract care for all types of medical services for almost 200 years. This issue is especially compelling as to those seamen who are ill or injured in areas where there are no PHS facilities, such as the numerous seamen in Alaska. It is a serious question which is a fair ground for litigation whether the Secretary can exercise pure discretion over their only form of free medical care. Given the fact that without free medical care, to which they have always been accustomed, many seamen will not seek care, their health is endangered and the possibility of irreparable harm is great. This is especially a concern because the May 8 regulation provides for contract care only where a "life-threatening" emergency exists. Thus, the Court feels that serious questions are raised which should be the grounds for litigation.

As to the balance of hardships, the defendants strongly argue that the public and themselves will suffer severe harm if the injunction is granted. The defendants contend

that if they are required to continue to fund contract services, they will run out of money. This will require closure of the entire PHS system by July. Such action will irreparably harm those who need hospital and clinical facilities in July and August. The defendants also contend that for the Court to require funding of contract care, a violation of the anti-deficiency statutes will result.

The Court disagrees with this contention. If the Court orders funding of contract care, defendants cannot refuse to fund PHS hospitals and facilities because the Court has ordered that hospitals and facilities remain open and provide services until there is compliance or repeal of 42 U.S.C. § 248a. Presumably, this latter-mentioned order is what defendants contend violates the anti-deficiency statutes.

But the Court, despite anti-deficiency statutes which are primarily directed to government officers who spend money and those third parties who seek to recover money for services rendered to the government, may order a governmental agency to perform a mandatory duty. Providing medical care to seamen at PHS hospitals and facilities is a mandatory duty pursuant to 42 U.S. §§ 248a and 249. If funds do in fact run out, defendants must take money from some "discretionary use" fund, or ask plaintiff for a modification of the preliminary injunction due to lack of funds.

Thus, as the PHS hospitals and clinics must remain funded, there is no basis for a finding of harm to the public or to defendants.

There is a possibility of serious harm to the plaintiff class. As discussed earlier, seamen have relied on contract care for almost 200 years, and seamen not close to a PHS facility may have a very serious injury or health problem but not a "life-threatening emergency" that could go untreated. Thus, serious potential harm is present, and the balance of hardships tips overwhelmingly in favor of plaintiff.

In conclusion, as there are serious questions presenting a fair ground for litigation, and as the balanced hardships tips decidedly in plaintiff's favor, the Court will grant a preliminary injunction as to the provision of contract care.

The language of this aspect of the injunction creates some difficulty for the Court. As the provision of contract care is subject to some discretion with the Secretary, the Court does not want to command the Secretary to perform certain purely discretionary functions. However, as noted earlier, there is a serious question as to whether the provision of contract services is completely discretionary, considering the injustice, hardships, and harm that can come to seamen who are not near a PHS hospital or facility. Thus, the Court will order defendants restrained from exercising their discretion in an arbitrary manner, as there is a strong possibility that failure to provide contract care under 42 U.S.C. § 249 to seamen not near PHS hospitals or facilities, except in cases of life-threatening emergencies, is an improper exercise of discretion.

The Court finds good cause for issuing the preliminary injunction without the necessity of a bond.

This opinion shall constitute findings of fact and conclusions of law. Plaintiff is directed to prepare an appropriate Order of Preliminary Injunction in accordance with this Order.

IT IS SO ORDERED.

DATED: June 4, 1981.

/s/ Robert P. Aguilar

United States District Judge

Appendix D

United States Court of Appeals
For the Ninth Circuit

No. 81-4295

Sailors' Union of the Pacific, AFL-CIO,
Plaintiffs,

vs.

Richard S. Schweiker, Secretary of the Department of Health and Human Services of the United States, et al.,
Defendants.

[Filed June 17, 1981]

Before: Choy, Alarcon, and Norris, Circuit Judges

ORDER

The district court issued its preliminary injunction on June 4, 1981. On the same day, Congress passed P.L. 97-12 which appears to have an impact on the issues in this case. As it is unclear whether the district court had in mind the substance of the new law when it issued the injunctive order, the court remands to the district court to reconsider forthwith its June 4, 1981 decision in light of P.L. 97-12.

The expedited briefing schedule and oral argument scheduled on June 23, 1981, as set forth in the court's order of June 9, 1981, are stayed pending the district court's decision upon reconsideration. The parties shall immediately advise the court of the district court's decision, at which time the court will set a new schedule if necessary for briefing and oral argument. If the district court modifies its decision, a new appeal may be taken therefrom.

Appendix E

United States District Court
Northern District of California

No. C-81-2079 RPA

Sailors' Union of the Pacific, AFL-CIO,
Plaintiff,

vs.

Richard S. Schweiker, Secretary of the Department of Health and Human Services of the United States; Leonard Bachman, Assistant Surgeon General of the United States; Truman L. McCasland, Director, United States Public Health Services Hospital, San Francisco,
Defendants.

[Filed June 18, 1981]

ORDER

On June 4, 1981, this Court issued a preliminary injunction restraining defendants from taking any actions that will inhibit medcial care at any PHS hospital or facility or reduce care at such facilities below that level and range provided on January 1, 1973, until Congress complied with or repealed 42 U.S.C. § 248a. The Court also restrained defendants from exercising their discretion in an arbitrary

manner when determining those entitled to contract medical care.

On the afternoon following this Court's decision, Assistant United States Attorney, Richard de Saint Phalle, contacted my law clerk and asked that she communicate to the Court the defendants' request for a hearing on whether P.L. 97-12, adopted by Congress as the Court was making its ruling, would require the Court to dissolve or modify the preliminary injunction. At my request my law clerk contacted Mr. de Saint Phalle the following morning and told him that the Court would like defendants' request to be in writing (and the writing could be brief), so that the Court could determine whether it wanted to allow a hearing, and if not, to explain such a denial in writing. Later that same day, my law clerk was contacted by Mr. de Saint Phalle, who told the law clerk that he would not be able to prepare anything in writing due to the press of work for the appeal until at least Monday. My law clerk expressed my desire that the Court would like to rule before the matter went to the Court of Appeals, but that whenever the Court received the requested written materials, the Court would make a decision. The Court never received such written materials, and thus the Court never ruled on the matter. The Court did not deny defendants a hearing on the matter.

The Court now takes this "opportunity" to make its decision as to whether P.L. 97-12 affects the preliminary injunction it has heretofore issued.

42 U.S.C. § 248a provides that the Secretary of Health & Human Services may not (a) close or transfer control

of a PHS hospital, (b) reduce the level and range of health care services provided at such hospital below the level and range required by the statute, or (c) reduce the level and range of other health-related activities conducted at such hospitals from the level and range required by the statute, unless Congress by law *specifically authorizes* such action. Accordingly, the Court ordered by its preliminary injunction that none of the prohibited actions could be taken until Congress either complied with the provisions of section 248a, or repealed section 248a.

The question then is whether P.L. 97-12 accomplishes either requirement. The Court finds that it does not. Clearly P.L. 97-12 does not repeal section 248a; nor does it comply with the specificity requirement set forth by Congress in 248a. The test of P.L. 97-12 is devoid of any such language. It merely provides that no more than a certain amount of funds will be available for PHS hospitals and facilities, and does not specifically authorize any hospital closures or reduction of services provided therein.

Even referring to the language of the Conference Report relating to P.L. 97-12 does not change the Court's conclusion. (House Report No. 97-124.) In addition to providing only a limited amount of funds available for PHS hospitals and facilities, the Report states that Department of Health and Human Services is to use funds available for PHS hospitals first for the operation, maintenance and transition costs of those hospitals and clinics whose communities have made a firm commitment to assume their operations, and second, to maintain as many of the other services as possible. (House Report at pp. 68-69.) Such language clearly

does not specifically authorize the closings of any hospitals.[1] And the language "to maintain as many services as possible" does not specifically authorize the reduction of services in the hospitals. Congress has provided in section 248a a specific means for closing PHS hospitals and facilities and reducing the services provided therein. To comply with this statutory requirement, Congress must specifically authorize closing of hospitals or reduction of services. There is no specific authorization of hospital closings and no specific authorization of the reduction of services provided at the hospitals. Again, Congress cannot impliedly, by budget cuts, be allowed to accomplish what it has provided a specific procedure to accomplish. Until Congress repeals section 248a or complies with its mandatory provisions, hospital closures and reduction of services below 1973 levels cannot occur.[2]

Thus, the Court enters the foregoing opinion at the request of the Court of Appeals, denies defendants' motion to dissolve the preliminary injunction, and reaffirms the issuance of its preliminary injunction.

IT IS SO ORDERED.

DATED: June 18, 1981.

/s/ Robert P. Aguilar

United States District Judge

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[1]In fact the Report provides that no hospital can be closed before October 1, 1981. House Report at page 69.

[2]As P. L. 97-12 only pertains to the issuance of the preliminary injunction pursuant to 248a, the portion of the preliminary injunction relating to contract care need not be discussed herein.

Opposition

Office - Supreme Court, U.S.
FILED
JAN 4 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-886

In the Supreme Court of the United States

OCTOBER TERM, 1981

SAILORS' UNION OF THE PACIFIC, AFL-CIO, PETITIONER

v.

RICHARD S. SCHWEIKER, SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-886

SAILORS' UNION OF THE PACIFIC,
AFL-CIO, PETITIONER

v.

RICHARD S. SCHWEIKER, SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner seeks review of the court of appeals' order vacating a preliminary injunction that enjoined the Secretary of Health and Human Services and other government officials[1] from reducing the services provided by Public Health Service (PHS) hospitals below the level provided on January 1, 1973. Petitioner brought this action as the representative of merchant seamen who it claims are entitled to free medical care from the PHS under Section 322(a) of the Public Health Service Act, 42 U.S.C. 249(a). Petitioner argues that Section 818 of the Department of Defense Appropriation Authorization Act of 1974, 42 U.S.C.

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[1]In addition to Secretary Schweiker, the following officials were named as defendants in the district court proceedings: Leonard Bachman, Assistant Surgeon General, and Truman L. McCasland, Director of the Public Health Service Hospital in San Francisco.

(Supp. III) 248a, prohibits reduction of PHS services below 1973 levels without explicit congressional authorization, and asserts that Congress's failure to appropriate sufficient funds to maintain such a level of services does not suspend the requirements of Section 818. Petitioner overlooks the fact that the Omnibus Budget Reconciliation Act of 1981, enacted shortly after the court of appeals' decision, repealed merchant seamen's Section 322(a) entitlement and expressly authorized the transfer or closure of all PHS hospitals and stations, thus satisfying the requirement of Section 818. See Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, Title IX, Subtitle J, 95 Stat. 602-605.

1. At the time that this suit was filed, the PHS operated eight hospitals and a number of clinics.[2] The primary beneficiaries of the PHS hospitals and clinics system were American merchant seamen, who were entitled to free care at PHS hospitals and stations by virtue of Section 322(a) of the Public Health Service Act. Under the terms of Section 818 of the Department of Defense Appropriation Authorization Act of 1974, the PHS was required to provide at its eight hospitals "a level and range" of services "as great as" that provided on January 1, 1973, and was forbidden to close, transfer or reduce services at PHS hospitals unless "Congress by law * * * specifically authorizes such action."

Early in the first session of the 97th Congress, a number of measures were introduced to abolish free medical care for merchant seamen, to transfer or close all PHS hospitals and clinics, and to rescind substantial portions of the PHS's

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[2]Since the enactment of the Omnibus Budget Reconciliation Act of 1981, most of the clinics have been closed, two hospitals have been transferred to other federal agencies, and two hospitals have been transferred to non-federal agencies. Under Section 987(d) of the Omnibus Budget Reconciliation Act of 1981, 95 Stat. 603, the PHS continues to operate the remaining four hospitals pending their transfer to non-federal agencies.

appropriation for fiscal year 1981. See generally Pet. App. A-8; H.R. Rep. No. 97-158, 97th Cong., 1st Sess. 367-375, 567-570 (1981); S. Rep. No. 97-67, 97th Cong., 1st Sess. 201-202 (1981). On April 23, 1981, in anticipation of the enactment of these measures, the Secretary of Health and Human Services and the Assistant Surgeon General formulated a "closure policy" for the PHS hospitals and clinics system on the assumption that "effective October 31, 1981, the PHS system would be closed" (Pet. App. A-9). The Secretary also acted to curtail certain discretionary services that were being provided by the PHS, in order to ensure that there would be sufficient funds to maintain the level of services required by Section 818 at PHS hospitals until the end of the 1981 fiscal year (Pet. App. A-9).[3]

In response to these actions, petitioner brought this suit in the United States District Court for the Northern District of California, seeking to enjoin the closure of PHS facilities and the reduction of services provided by the PHS to merchant seamen. On June 4, 1981, the district court entered a preliminary injunction against "any actions that will inhibit * * * or reduce care" at any PHS facility "below that level and range provided on January 1, 1973" (Pet. App. A-15). The government immediately appealed from this order, and on June 17, 1981, the court of appeals sua sponte remanded the case to the district court for reconsideration in light of the enactment, on June 5, 1981, of the Supplemental

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[3]Prior to the enactment of the Omnibus Budget Reconciliation Act of 1981, Section 322(e) of the Public Health Service Act, 42 U.S.C. 249(e), authorized the Secretary to pay for medical care provided by non-PHS facilities to persons who were entitled to free care in PHS facilities. Under this authority, arrangements had been made for non-PHS doctors and facilities to provide "contract care" at the PHS's expense to merchant seamen who were unable to use PHS facilities. On May 8, 1981, the regulations governing "contract care" were amended to limit such care to situations involving life-threatening medical emergencies. See 46 Fed. Reg. 25622-25624.

Appropriations and Rescission Act of 1981, Pub. L. No. 97-12, 95 Stat. 14, which rescinded $34 million from the 1981 appropriation for PHS hospitals and clinics (Pet. App. A-21 to A-22). On remand, the district court reaffirmed its earlier order, holding that Section 818 required express congressional approval of any reduction in PHS services and that "Congress cannot impliedly, by budget cuts, be allowed to accomplish what it has provided a specific procedure to accomplish" (Pet. App. A-26).

The court of appeals ordered expedited treatment of the government's renewed appeal. On June 24, 1981, it vacated the preliminary injunction and remanded the case to the district court, holding that the district court had abused its discretion in granting a preliminary injunction (Pet. App. A-1 to A-2). The court of appeals found that the balance of hardships and the public interest weighed against injunctive relief since the PHS would exhaust its 1981 appropriation prior to the end of the fiscal year unless it was allowed to allocate its limited funds. The court further found that "Congress ha[d] spoken with sufficient clarity" in the Supplemental Appropriations and Rescission Act of 1981 "to suspend the operation of" Section 818 (Pet. App. A-2).[4]

2. The decision of the court of appeals is clearly correct. It is undisputed that even before the enactment of the Supplemental Appropriations and Rescission Act of 1981, the PHS had insufficient funding to maintain all of the services that it had been providing through the end of the 1981 fiscal year (see Pet. App. A-9). Thus, it was "incumbent upon" the PHS to "create reasonable classifications and eligibility requirements in order to allocate the limited funds available" to it. *Morton* v. *Ruiz*, 415 U.S. 199, 230-231 (1974). See also 31 U.S.C. 665(c)(1). The administrative

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[4]On July 8, 1981, Justice Rehnquist denied petitioner's application for a stay of the court of appeals' mandate.

steps that are challenged by petitioner were taken to prepare for an orderly phase-out of the PHS hospitals and clinics system and sought to ensure that PHS hospitals would have sufficient available funds to remain open until Congress enacted the anticipated repeal of Section 818. At no time did the PHS propose closing any of its hospitals without prior congressional approval. With the enactment of the Supplemental Appropriations and Rescission Act of 1981, not only did the need for economizing become more acute, but the congressional intention to phase out the PHS hospital system was unambiguously manifested. The Conference Committee Report expressly described the Act as placing a "ceiling on obligations for the operation of the hospitals and clinics program" and directed that the PHS use its limited funding "first for the operation, maintenance and transition costs of those hospitals and clinics whose communities have made a firm commitment to assume their operations," and only then "to maintain as many of the services of the other facilities as is possible." H.R. Conf. Rep. No. 97-124, 97th Cong., 1st Sess. 68-69 (1981). This clear expression of congressional intent necessarily superseded the obligations that Section 818 had imposed. See *United States* v. *Will*, 449 U.S. 200, 222 (1980); *United States* v. *Dickerson*, 310 U.S. 554, 555 (1940).

Subsequent to the court of appeals' decision, Congress enacted the Omnibus Budget Reconciliation Act of 1981. In the clearest possible language this Act directed that "notwithstanding section 818," the Secretary of Health and Human Services shall "provide for the closure, transfer, or financial self-sufficiency of all hospitals and other stations of the Public Health Service." Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, Section 987(a), 95 Stat. 603. Section 987(c) of the Act, 95 Stat. 603, fixed September 30, 1981, as the deadline by which the Secretary was

required to determine which PHS facilities could be transferred on a self-sustaining basis to non-federal control. It further provided, in Section 987(d), that the PHS may continue to operate facilities that can be so transferred until September 30, 1982, but directed that all other PHS hospitals and stations close as of October 31, 1981. This explicit statutory provision for termination of the PHS hospitals and clinics system, coupled with the repeai, in Section 986 of the Act, 95 Stat. 603, of all entitlements to free medical care from the PHS, is plainly dispositive of petitioner's claims.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General

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